

2015 WL 3895555 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)  
Superior Court of California.  
Central Division  
Fresno County

Marie ABUHILAL, as an individual; Georgia Debrum, Decedent, Plaintiff,

v.

BETHEL LUTHERAN HOME, a California Corporation, and Does 1 through 100, inclusive, Defendants.

No. 13CEG03409.  
May 27, 2015.

### **Opposition to Defendant's Demurrer to Plaintiffs' Second Amended Complaint**

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#### **I. INTRODUCTION**

Simply put, this case alleges that BETHEL LUTHERAN HOME committed **elder abuse** and engaged in willful misconduct when it intentionally failed to provide adequate and necessary staff at their facility and when it purposeful withheld medical care and treatment for Mrs. Debrum for a period of six hours - which led to her death.

On August 3, 2012, Mrs. Debrum suffered three [fractures to her leg](#) while being transferred on a Hoyer lift. Despite these obvious injuries, Defendants refused provide emergent care and treatment and refused to call an ambulance for six hours. When finally in route to the hospital, Mrs. Debrum suffered a [cardiac arrest](#) as a result of the trauma. Mrs. Debrum died later that same day.

Upon being admitted to the hospital, it was documented that Mrs. Debrum suffered from multiple [bed sores](#) and probable sepsis. This documentation by the hospital is important because Defendant's medical charting the very same day, fraudulently states that Mrs. Debrum had no [bedsores](#) whatsoever.

#### **II. LEGAL ARGUMENT**

##### **1. As to any claim to which a demurrer is sustained, the Court should grant Plaintiff leave to amend because the claimed defects can be cured through additional amendments.**

Normally, even if a demurrer is sustained, leave to amend is routinely granted, where a fair opportunity to correct any defect has not been given. [Angie M. v. Superior Court](#) (1995) 37 Cal.App.4th 1217, 1227. Absent a request for leave to amend, no **abuse** of discretion will be found unless a potentially effective amendment is both apparent and consistent with plaintiffs theory of the case. [CamsiIV. Hunter Technology Corp.](#) (1991) 230 Cal.App.3d 1525,1542. The burden is on the plaintiff to show in what manner he or she can amend the complaint, and how that amendment will change the legal effect of the pleading. [Hendy v. Losse](#) (1991) 54 Cal.3d 723, 742. In ruling on a demurrer, a court construes the complaint "liberally. with a viewto substantial justice between the parties." [Code Civ. Proc. § 452](#); see [Stevens v. Superior Court](#) (1999) 75 Cal.App.4th 594, 601. A complaint that shows some right to relief, even if the facts are not clearly stated, is generally held sufficient against demurrers. See, e.g., [Gressley v. Williams](#) (1961) 193 Cal.App.2d 636, 639.

It is an **abuse** of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4<sup>th</sup> 962, 966-967 [9 Cal. Rptr. 2d 92, 831 P.2d 317].)

Plaintiff here believes that he has pled sufficient facts to state proper claims against Defendant and the Court should overrule Defendant's demurrers. However, even if the Court does identify some defect in any of these claims, the Court should grant Plaintiff leave to amend to cure it.

## 2. The Cause of Action for **Elder Abuse** is Sufficiently Pled.

### a. General Principles of **Elder Abuse**

The **Elder Abuse** Act defines **abuse** as “physical **abuse**, neglect, **financial abuse**, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering” (*Welf. & Inst. Code, § 15610.07, subd. (a)*, italics added); or “[t]he deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering” (id., § 15610.07, subd. (b)). The Act defines neglect as “[t]he negligent failure of any person having the care or custody of an **elder** or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.” (*Welf. & Inst. Code, § 15610.57, subd. (a)(1)*.)

“Neglect includes, but is not limited to, all of the following: (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter. (2) Failure to provide medical care for physical and mental health needs... (3) Failure to protect from health and safety hazards. (4) Failure to prevent malnutrition or dehydration.” (Id., § 15610.57, subd. (b).) In short, neglect as a form of **abuse** under the **Elder Abuse** Act refers “to the failure of those responsible for attending to the basic needs and comforts of **elderly** or dependent adults, regardless of their professional standing, to carry out their custodial obligations.” (*Delaney v. Baker* (1999) 20 Cal.4<sup>th</sup> 23, 34 [82 Cal. Rptr. 2d 610, 971 P.2d 986] (*Delaney*).) Thus, when the medical care of an **elder** is at issue, “the statutory definition of ‘neglect’ speaks not of the undertaking of medical services, but of the *failure to provide medical care*.” (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4<sup>th</sup> 771, 783 [ Cal. Rptr. 3d 222, 86 P.3d 290] (emphasis added); see also id. at p. 786 [“statutory **elder abuse** may include the egregious withholding of medical care for physical and mental health needs....”) The **Elder Abuse** Act makes certain enhanced remedies available to a plaintiff who proves **abuse** of an **elder**, i.e., a “person residing in this state, 65 years of age or older.” (*Welf. Inst. Code, § 15610.27*.) In particular, a plaintiff who proves “by clear and convincing evidence” both that a defendant is liable for physical **abuse**, neglect or **financial abuse** (as these terms are defined in the Act) and that the defendant is guilty of “recklessness, oppression, fraud, or malice” in the commission of such **abuse** may recover attorney fees and costs. (*Welf. Inst. Code, § 15657, subd. (a)*.) On the same proof, a plaintiff who sues as the personal representative or successor in interest of a deceased **elder** is partially relieved of the limitation on damages imposed by *Code of Civil Procedure* section 377.34 and may recover damages for the decedent's pre-death pain and suffering. (*Welf. Inst. Code, § 15657, subd. (b)*.)

To recover the enhanced remedies available under the **Elder Abuse** Act from a health care provider, a plaintiff must prove more than simple or even gross negligence in the provider's care or custody of the **elder**. (*Welf. & Inst. Code, § 15657.2*; *Delaney*, supra, 20 Cal.4<sup>th</sup> at p. 32; *Sababin v. Superior Court* (2006) 144 Cal.App.4<sup>th</sup> 81, 88 [50 Cal. Rptr. 3d 266] (*Sababin*).) The plaintiff must prove “by clear and convincing evidence” that “the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the neglect.” (*Welf. & Inst. Code, § 15657*.) Oppression, fraud and malice “involve ‘intentional,’ willful,’ or ‘conscious’ wrongdoing of a ‘despicable’ or ‘injurious’ nature.” (*Delaney*, at p. 31.) Recklessness involves of the ‘high degree of probability’ that an injury will occur” and “rises to the level of a ‘conscious choice of a course of action... with knowledge of the serious danger to others involved in it.’ “ (Id. at ¶¶ 31-32.) Thus, the enhanced remedies are available only for of egregious **abuse** against **elder** and dependent adults.” (Id. at p. 35; see also *Covenant Care*, supra, 32 Cal.4<sup>th</sup> at p. 786 [“statutory **elder abuse** may include the egregious withholding of medical care for physical and mental health needs In short,

“in order to obtain the Act's heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages.” (Covenant Care, at p. 789.) 4

***b. Plaintiff has Pled Neglect with Sufficient Particularity***

To adequately plead “neglect,” a plaintiff must allege facts establishing that the defendant: (1) had responsibility for meeting the basic needs of the **elder** or dependent adult, such as nutrition, hydration, hygiene or medical care; (2) knew of conditions that made the **elder** or dependent adult unable to provide for his or her own basic needs; and (3) denied or withheld goods or services necessary to meet the **elder** or dependent adult's basic needs. (Carter v. Prime Healthcare Paradise Valley LLC (2011) 198 Cal.App.4<sup>th</sup> 396). 4<sup>th</sup> 612.

In this case, Plaintiffs are able to show neglect on multiple levels. First, Plaintiff has adequately pled that after Plaintiff suffered three **fractures to her leg** during a transfer, Defendants failed to provide any emergent medical care for a period of six hours. This ultimately and directly led to her death. Second, Plaintiff has adequately pled that Defendants neglected Plaintiffs physical needs —specifically that they failed to acknowledge or treat Plaintiffs multiple **bedsores** and probable sepsis which is by all accounts, a failure to assist in her personal hygiene and well being. The fraudulent documentation is further evidence that Defendants were willful in their neglect - and they just did not expect to be caught.

While Plaintiff can appreciate Defendant's position that she must show something more than just negligence, the Second Amended Complaint has adequately done so.

**3. Mildred Debrum Has Been Properly Joined and Served**

Mildred Debrum was named as a nominal Defendant on March 26, 2015. On May 15, 2015, Mildred Debrum was served a copy of the Second Amended Complaint and Summons. It is expected that Ms. Debrum will not participate in the litigation and Plaintiff will pursue the proper default prove-up as soon as statutorily possible.

**III. CONCLUSION**

Despite defendants' repeated attempts to excuse their mistreatment of Plaintiff as mere negligence, the facts pleaded show that their conduct recklessly disregarded Mrs. Debrum's health and safety.

For these reasons, as well as those set forth above, Plaintiff respectfully requests that the Court overrule Defendant's demurrer, or, in the alternative, that it grant leave to amend.

Dated: May 27, 2015

Respectfully Submitted

Wild, Carter & Tipton

Monrae L. English